

Laguerre v Aspenly Co. LLC

2017 NY Slip Op 32813(U)

October 30, 2017

Supreme Court, Queens County

Docket Number: 706019/14

Judge: Darrell L. Gavrin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

VIKY LAGUERRE and DAVID LAGUERRE,

Index No. 706019/14

Plaintiffs,

Motion

Date June 19, 2017

- against-

ASPENLY CO. LLC and CONTINENTAL
REFRIGERATOR,

Motion

Cal. No. 70

Defendants.

Motion

Seq. No. 4

The following papers numbered EF87 to EF204 read on this motion by Aspenly Co., LLC (Aspenly), for summary judgment in its favor dismissing all claims and cross claims against it; and cross motion by plaintiff to compel Aspenly to produce an additional witness, namely Adam Rose, for examination before trial; to compel Continental Refrigerator (Continental), to produce (additional witness) John Kaldwader for deposition; to compel non-party, Wichcraft Operating, LLC (Wichcraft), to comply with plaintiffs' subpoena *duces tecum* served March 18, 2016; and for leave to serve a third Supplemental Bill of Particulars; and awarding sanctions against Aspenly.

Papers
Numbered

Notice of Motion - Affirmation - Exhibits.....	EF87 - EF103
Notice of Cross Motion - Affirmation - Exhibits.....	EF163 - EF197
Affirmation in Opposition - Exhibits.....	EF141 - EF162, 198
Reply Affirmation.....	EF199 - EF200, 203 - 204

Upon the foregoing papers, it is ordered that the motion and cross motion are determined as follows:

Plaintiff, Viky Laguerre ("plaintiff"), in this negligence action seeks damages for personal injuries sustained when, in the course of performing certain duties for her employer, Wichcraft (the tenant), she slipped and fell on a wet substance located near the refrigerator. The refrigerator is alleged to have been defective in that it permits water to accumulate around the outside, thereby creating a dangerous condition. Plaintiff asserts a negligence claim against Aspenly, the out-of-possession landlord, a product liability claim against the refrigerator's

manufacturer, Continental Refrigerator. The claims of David LaGuerre, are derivative.

Aspenly moves for summary judgment in its favor on the ground that it is an out-of-possession landlord and may not be liable for a condition in the leased premises that allegedly caused plaintiff's injury but which is under the exclusive possession and control of plaintiff's employer (the tenant), and for which Aspenly was not actually, constructively or contractually responsible. Plaintiff opposes the motion and cross moves for further examination before trial of additional witnesses from Continental and Aspenly. The cross motion is opposed by Aspenly and Continental.

Facts

Plaintiff alleges in her pleadings and in her verified bill of particulars that on September 1, 2011, while working as a cook for Wichcraft restaurant at 60 East 8th Street, in New York City, she slipped and fell "due to water leaking from a refrigerator." She testified at her examination before trial that her accident occurred in front of a refrigerator in the restaurant's kitchen, near the entrance to the dining area. Plaintiff further testified that both of her feet were about twelve inches away from the base of the refrigerator when she slipped, and she described the floor as "tiles or marble," with no mat. Plaintiff described the accumulation of water as rectangular and one-to-two feet long. There was no water on the floor anywhere else in the kitchen at the time of the accident. Plaintiff testified that she first noticed the accumulation of water that caused her to slip the moment she stepped in it, when it splashed. She could not remember whether she observed the accumulation that day before she slipped, but she testified that she made "constant" trips to and from the refrigerator over the approximate five and a half hours that she worked in the kitchen prior to the accident. She did not know how long it had existed before she fell.

Plaintiff further testified that for approximately one year before the accident, there was "always" water in the area where she fell because the top part of the front of the refrigerator would "constant[ly]" drip water. Plaintiff testified that one of the motors in the back of the refrigerator also leaked "black water," for about a year prior to the accident. She stated that she believes the "black smelly" water that caused her to slip came from the refrigerator but she was not sure whether it came from the interior or the motor.

Plaintiff stated that she and the other cooks "always" complained about the two refrigerator leaks and the alleged conditions to Wichcraft's general manager. Sometimes, plaintiff testified, a Wichcraft porter who was "in charge of cleaning the store" would dry the floor around the refrigerator with a mop that he kept in the kitchen. Plaintiff further testified that she did not know the landlord or its agents and did not know whether the general manager or anyone else from Wichcraft ever spoke to the landlord about the leaks or the alleged conditions.

By a standard form store lease dated January 23, 2006 (“the Lease”), Aspenly leased to Wichcraft the entirety of “Store #2S and basement area below” at 60 East 8th Street, in New York City. Article 4 of the Lease provides that Aspenly “maintain and repair the public portions of the building.” Notably, there are no other provisions in the Lease imposing an affirmative obligation upon Aspenly to maintain or repair any part of the leased premises, and Aspenly did not retain a right of re-entry for repairs or maintenance.

Article 4 further provides that,

“[Wichcraft] shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and at its sole cost and expense, make all non-structural repairs thereto and when needed to preserve them in good working order and condition. . .”

Article 45[a] of the Lease rider provides:

[Wichcraft] shall take good care of the Premises and the fixtures, appurtenances, equipment and facilities therein and shall make, as and when needed, all repairs to the Premises required to keep them in good order and condition. . .

Article 45[b] of the Lease rider states:

The provisions of this Article 45 shall not be deemed to impose upon Owner any obligation for the furnishing of any service maintenance or repair other than as expressly set forth in this Lease. Except as set forth herein, Owner shall have no obligation to make any changes, repairs or replacements to the Premises, exterior or interior, ordinary or extraordinary, structural or non-structural, foreseen or unforeseen.

Aspenly’s managing agent affirms that the Lease was effective September 1, 2011, and that Wichcraft solely and exclusively occupied store #2S as of that date. Aspenly submits that neither Aspenly nor its agent maintained an office or place of business on the property, and neither entity employed staff for purposes of cleaning or maintaining the interior of store #2S. Furthermore, Wichcraft’s vice-president acknowledges that the restaurant owned all of the refrigerators in the store.

Discussion

“An out-of-possession landlord generally will not be responsible for injuries occurring on its premises unless the landlord ‘has a duty imposed by statute or assumed by contract or a course of conduct’ ” (*Healy v Bartolomei*, 87 AD3d 1112, 1113 [2d Dept 2011], quoting *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 18 [2d Dept 2011]). In such case, only a significant structural or design defect that is contrary to a specific statutory safety

provision will support imposition of liability against the landlord (*Quinones v 27 Third City King Rest.*, 198 AD2d 23, 24 [1st Dept 1993]; *Levy v Daitz*, 196 AD2d 454 [1st Dept 1993]).

Here, Aspenly established its entitlement to summary judgment by demonstrating, *prima facie*, that it was an out-of-possession landlord, that the lease placed responsibility for the repair of the leased premises on the tenant, and that it did not violate any relevant statute or regulation (*Madry v Heritage Holding Corp.*, 96 AD3d 1022, 1023 [2d Dept 2012]; see *Mercer v Hellas Glass Works Corp.*, 87 AD3d 987, 988 [2d Dept 2011]). Articles 4, 45[a] and 45[b] of the Lease place all responsibility for repairs and maintenance of the leased premises on the tenant restaurant, including correction or repair of appliances after the tenant takes occupancy and/or which were caused by the tenant.

Furthermore, plaintiff failed to demonstrate that the leaking refrigerator constituted a significant structural or design defect which violated a specific statutory safety provision (see *Sangiorgio v Ace Towing and Recovery*, 13 AD3d 433, 434 [2d Dept 2004]; *Thompson v Port Auth. of N.Y. & N.J.*, 305 AD2d 581, 582 [2003]).

Plaintiff's submissions in opposition are insufficient to raise a triable issue of fact. Plaintiff failed to raise a triable issue of fact as to Aspenly's notice of the alleged defect or whether the alleged condition was a "significant structural or design defect which violated a specific statutory safety provision (see *Sangiorgio v Ace Towing and Recovery*, 13 AD3d 433, 434 [2d Dept 2004]; *Thompson v Port Auth. of N.Y. & N.J.*, 305 AD2d 581, 582 [2003]).

Furthermore, contrary to defendants' contention, plaintiff's motion is not premature as defendants "failed to offer an evidentiary basis to suggest that [further] discovery may lead to relevant evidence" (*Conte v Frelen Assoc.*, 51 AD3d 620, 621 [2d Dept 2008]; see *Lopez v WS Distrib., Inc.*, 34 AD3d 759 [2d Dept 2006]). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered' by further discovery is an insufficient basis for denying the motion" (*Woodard v Thomas*, 77 AD3d 738, 740 [2d Dept 2010], quoting *Lopez v WS Distrib., Inc.*, 34 AD3d at 760).

Cross Motion

The branch of the cross motion which is to compel the examination before trial of a second Aspenly witness, is denied as moot in light of the court's decision dismissing the action insofar as asserted against Aspenly.

The branch of the cross motion which is to compel the examination before trial of an additional Continental witness is granted. In order to show that additional depositions are necessary, the moving party must show (1) that the representatives already deposed had insufficient knowledge, or were otherwise inadequate, and (2) there is a substantial likelihood that the persons sought for depositions possess information which is material and necessary to the prosecution of the case (see *Simon v Advance Equip. Co.*, 126 AD2d 632 [2d Dept 1987];

Schillaci v Jamaica Sav. & Loan, 90 AD2d 770 [2d Dept 1982]). Haselbarth, at his deposition, stated that he did not himself know if any prior complaints had been made regarding the subject brand/series of refrigerators. Haselbarth testified extensively that such complaints are sent to the warranty and services department. It is clear, therefore, that plaintiffs require a witness from that department to provide information necessary to this action. As head of the warranty and services department at the time of the subject accident, there is a substantial likelihood that Mr. Kaldwader possesses information material and necessary to the prosecution of the instant case. Plaintiffs should, therefore, be allowed to depose Kaldwader.

The branch of the cross motion which is to compel non-party Wichcraft to provide “any and all documents pertaining to the purchasing. . . maintenance . . .and or destruction of any refrigerator units that were in use at the subject property in 2011,” is granted. If said records no longer exist, plaintiff may properly subpoena a Wichcraft witness who can testify as to what was in the said invoices and documents.

Where a subpoena *duces tecum* is alleged to have been violated, as in the instant case, plaintiff must show that the party from whom the documents were sought had the ability to produce them (*see Sigety v Abrams*, 632 F.2d 969, 975 [2d Cir 1980]). The party seeking the documents may demonstrate that the other party has the ability to produce the requested documents by means of an “inference of continuing possession” which “may be properly drawn in a case involving books and records known to be in the possession of a subpoenaed witness shortly before the issuance of a subpoena demanding their production” (*Sigety v Abrams*, 632 F.2d at 974). Here, in response to plaintiffs’ subpoena, Wichcraft responded that “Wichcraft does not possess responsive materials.”

Although there is no evidence as to when the documents which Wichcraft stated were missing disappeared, it is certainly true that Wichcraft must, at one time, have had documents in its possession relating to its refrigerators. Therefore, plaintiffs can take advantage of the inference of continuing possession to satisfy their initial burden and to shift the burden to Wichcraft. Since plaintiffs have satisfied their initial burden of going forward, the burden shifts to Wichcraft to rebut the inference of continuing possession by providing a “reasonable explanation for ... non-compliance” (*Sigety v Abrams*, 632 F.2d at 974; *see* CPLR 2308[a]).

CPLR 3101(a)(4) is one mechanism by which a party may obtain discovery from a non-party (CPLR 3101[a][3]). It provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: ... (4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required” (emphasis supplied). The words “material and necessary” as used in section 3101 must “be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” (*Kapon v Koch*, 23 NY3d 32, 38 [2014], quoting *Allen v Crowell–Collier Publ. Co.*, 21 N.Y.2d 403, 406 [1968]; *Ferolito v Arizona Beverages USA, LLC*, 119 AD3d 642, 643 [2d Dept 2014]). Section 3101(a)(4) imposes no requirement that the subpoenaing

party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the non-party (*Kapon v Koch*, 23 NY3d at 36).

The branch of the cross motion which is for leave to serve a third supplemental bill of particulars, is granted (*see Balsamo v City of New York*, 287 AD2d 22, 27 [2d Dept 2001] (“plaintiff may serve supplemental bill of particulars, even without leave of court, to assert statutory violations which merely amplify his or her theories of liability”).

Conclusion

The motion by Aspenly for summary judgment in its favor, is granted.

The branch of the cross motion which is to depose an additional Aspenly witness, is denied as academic in light of the court’s determination dismissing the complaint, insofar as asserted against Aspenly.

The branch of the cross motion by plaintiffs which is to depose an additional Continental witness, namely, Mr. Kaldwader, is granted.

The branch of the cross motion which is to compel non-party Wichcraft to provide “any and all documents pertaining to the purchasing. . . maintenance . . .and or destruction of any refrigerator units that were in use at the subject property in 2011,” is granted. If said records no longer exist, plaintiff may properly subpoena a Wichcraft witness who can testify as to what was in said invoices and documents.

The branch of the cross motion which is for leave to serve a third supplemental bill of particulars, is granted.

The branch of the cross motion by plaintiffs which is for sanctions against Aspenly, is denied as moot.

Dated: October 30, 2017

DARRELL L. GAVRIN, J.S.C.